1968

Prudential Federal Savings and Loan Association v. Wells R. King, et al., George W. Evans and Martha R. Evans, His Wife : Brief of Respondent

In The Supreme C
of the State of

PRUDENTIAL FEDERAL
LOAN ASSOCIATION, a

vs.

WELLS R. KING, et al.,

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GEORGE W. EVANS
EVANS, his wife,

BRIEF OF

Appe
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Honor

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CASES CITED

In The Supreme Court of the State of Utah

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a corporation,
Plaintiff and Appellant,

vs.

WELLS R. KING, et al.,
Defendants,

* * *

GEORGE W. EVANS and MARTHA R. EVANS, his wife,
Defendants and Respondents

No. 11316

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Respondents recognize that the Statement of Facts as set forth in Appellant's Brief is accurate insofar as it goes. However, because of omission of certain facts which Respondents feel are important, Respondents desire to supplement Appellant's State of Facts as to some details.

The Maurer Development Corporation, as seller, entered into a Uniform Real Estate Contract with Wells R.

King and his wife on February 1, 1962 for the sale of a parcel of ground described as:

> "Lot 3, Kings Village Subdivision, according to the official plat thereof; measuring 55.25 feet wide by 115 feet dept. Also known as 620 Garden Avenue, Salt Lake City, Utah."

The contract of sale recited that at that time there was "an obligation against said property in favor of Prudential Federal Savings and Loan Association. . . ."

On August 15, 1962, as part of a larger real estate transaction, the Kings assigned their interest as buyers in the contract to George W. Evans and his wife (respondents herein) and concurrently the Evans assigned their interest in the said contract to James T. Rice and Preston Norton and their wives. Rice and Norton were the real estate broker and salesman who handled the whole transaction. However, the document evidencing the latter assignment was dated August 18, 1962.

Subsequently, on September 7, 1962 the Rices assigned their interest in the said contract to the Nortons, who subsequently assigned their interest to one George Peterson, on February 15, 1963.

All assignments were executed on the standard form approved by the Utah State Securities Commission and the Utah State Realty Association. That form of assignment contains a clause which states as follows:

> "3. That in consideration of the assignors executing and delivering this agreement, the assignees covenant with the assignors as follows:

a. That the assignees will duly keep, observe and perform all of the terms, conditions and provisions of the said agreement that are to be kept, observed and performed by the assignors.

b. That the assignees will save and hold harmless the assignors of and from any and all actions, suits, costs, damages, claims and demands whatsoever arising by reason of an act or omission of the assignees."

There is no other wording in the assignment which relates to any assumption of the balance due under the contract or an agreement to pay the same.

On November 27, 1963 Prudential Federal Savings and Loan Association accepted a deed to the property from Maurer Development Corporation, in lieu of a foreclosure of its prior obligation recited in the contract. Prudential Federal Savings and Loan Association also took an assignment of the rights of Maurer Development Corporation as vendor under the Uniform Real Estate Contract.

Sometime subsequent to the assignment from the Rices to the Nortons, and prior to the deed from Maurer Development Corporation to Prudential Federal Savings and Loan Association, an amended description was attached to the contract by stapling. The amended description, which was initialed by the Maurer Development Corporation and by Preston L. Norton and his wife, sets forth a metes and bounds description of the property and also contains a statement that Kings Village Subdivision was an unrecorded subdivision.

On or about August 16, 1966, Prudential Federal Sav-

ings and Loan Association commenced the present action, alleging that a default occurred on or about September 1, 1965; that it was electing to treat the contract as a note and mortgage; and "to pass title to the buyer subject thereto" and to foreclose the same. In its Complaint, Prudential Federal Savings and Loan Association also alleged that these Respondents and the other subsequent assignees had "assumed and agreed to pay and discharge all of the buyer's obligations under said contract", which was denied by the Respondents in their Answer.

STATEMENT OF POINTS

POINT I. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFF'S CLAIM FOR DEFICENCY AGAINST THESE RESPONDENTS.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFF'S CLAIM FOR DEFICIENCY AGAINST THESE RESPONDENTS.

The view has often been expressed that for all practical purposes the relationship of seller and purchaser under an executory contract for the sale of land is equivalent to that of a mortgagor-mortgagee. See *Ferguson vs. Blood, 152 Fed. 98 (1907); Harris vs. Halverson, 192 Wis. 71 211 N. W. 295 (1927).*

It is also well setted that the acceptance of an assignment of the purchaser's interest under a real estate con-

tract does not place the assignee in privity of contract with the seller. In *Adron vs. Evans, 217 N. W. 397 (So. Dakota 1927)* the Court stated as follows:

> "The assignment contains no promise or agreement on the part of Evans to pay anything. The assignment of a contract for the sale of real estate does not create a personal liability on the part of the assignee without a provision to that effect. The assignee cannot require conveyance of the land to him without payment of the contract price, but he is not personally liable for that price unless he agrees or promises to pay it."

The courts have reasoned that a stipulation in the original contract, on the part of the purchaser, to pay the price is a personal and not a real convenant, and that it does not pass with the purchaser's equitable interest. This is so, even though the original contract contains a provision purporting to bind the assigns of the original purchaser. In *Lisenby vs. Newton, 120 Cal. 571, 52 Pac. 813 (1898),* the Court said:

> "There are authorities which deny that a covenant can in any case run with an equity, or without a legal estate in the land; we need not inquire what limitations attend the principle, for it is clear that the promise to pay the agreed price in a contract for the purchase of real estate is not of itself a covenant accompanying the equitable interest of the purchaser into the hands of his assignee."

In *Meyer vs. Droegemueller, 165 Minn. 245, 206 N. W. 391 (1925)* the court stated:

> "An assignment by the vendee of a contract for the

> purchase of real estate creates a privity of estate between the assignee and the original vendor, *but not a privity of contract.* It does not relieve the original vendee from his contractual obligations to the vendor or impose upon the assignee any personal liability for the unpaid purchase price, unless he assumed and agreed to pay it. That the original contract purports to bind the parties thereto, and their representatives and assigns, does not change the rule; neither does the fact that the assignee has been, or is, in possession of the land." (Emphasis added)

The rule is different, of course, as in the case of mortgage foreclosures where the assignee specifically assumes the obligation and agrees to pay it. Such is the case in the principal cases cited by the Appellant in its Brief. For example, in the case of *Lonas vs. Metropolitan Mortgage and Securities Company, 432 P. 2d 603 (Alaska, 1967),* which is quoted on page 6 of the Appellant's Brief, the excerpt quoted by Appellant states as follows:

> "In the assignment from the Becks to appellants, signed by both parties, the appellants agreed with the Becks that 'they *will pay the balance due on said real estate contract* and that the balance due thereon will be the obligation of the assignees' and that appellants 'would observe and perform all of the terms, conditions and covenants mentioned in said contract'. . . ." (Emphasis added)

in that case, there was an express assumption, in unequivocal language, which indicated that the assignees understood and agreed that they were assuming the obligation of paying the balance due.

So also in the case of *Barberich vs. Pooshichian, 211*

Pac. 236 (Cal. App. 1922), the Court, in its opinion, stated that no evidence was offered at the trial on the question of whether there had been an assumption by the assignee. However, the Court also pointed out that the plaintiff had alleged in its complaint that defendants had assumed the obligations of the contract, which allegations were not denied by the defendants. Consequently, in the *Barberich case* there was no controverted issue before the court as to whether the defendants had assumed the payment. The same cannot be said of this case, however, since the defendants (respondents herein) did controvert similar allegations in plaintiff's complaint.

There is no real dispute between the parties as to the significant of the holdings of the cases cited as they apply to the facts of each case. The real question before this Court is whether Paragraph 3 of the Assignment constitutes an assumption on the part of a subsequent assignee to pay the balance due under the original contract. As stated by this Court in the case of *Radley vs. Smith, 6 Utah 2d. 314, 313 P.2d 465 (1957):*

> "While it is no doubt possible for a party to become the assignee of the rights under a contract without becoming responsible for the duties, the question whether a purported assignment of an entire contract includes such assumption depends upon its terms and the intent of the parties. Whenever uncertainty or ambiguity exists with respect thereto it is proper for the court to consider all of the facts and circumstances, including the words and actions of the parties forming the background of the transaction."

The real question then involves a determination in each

particular case as to whether or not an assumption was intended by the parties by the words contained in Paragraph 3. Respondents respectfully submit that it is difficult to ascertain the intention of the parties where a standard form is used which does not clearly set out the obligations of the parties. It is respectfully submitted that the average layman would consider a real estate contract as an alternative to, and as roughly the equivalent of a mortgage in securing a real estate purchase. Indeed, as noted above, the courts themselves have generally tended to minimize the differences so as to consider them alternative means to the same ends. The average layman would probably understand the classical wording of a mortgage assumption (". . . which the grantee assumes and agrees to pay") as making him liable to the seller for the balance of the purchase price. This wording is well established through long usage and common familiarity in real estate transactions. However, Paragraph 3 supra contains no mention of any agreement on the part of the assignee to "assume" or "pay" the balance due. By its literal terms, Paragraph 3 provides as follows:

> "3. That in consideration of the assignors executing and delivering this agreement, the assignees covenant with the assignors as follows:
>
> a. That the assignees will duly keep, observe and perform all of the terms, conditions and provisions of the said agreement that are to be kept, observed and performed by the assignors.
>
> b. That the assignees will save and hold harmless the assignors of and from any and all actions, suits, costs, damages, claims and de-

> mands whatsoever arising by reason of an act or omission of the asignees."

Respondents respectfully submit that Paragraph 3, when read together as a whole, constitutes a hold-harmless agreemnt—that is, it is an agreement between the assignor and the assignee that the assignee will do the things required of the assignor under the contract and if he fails to do so will hold the assignor harmless from his default. As such the hold-harmless agreement is a personal agreement in the nature of an indemnity between the assignor and the assignee and cannot be assigned by either. There is nothing about the wording of Paragraph 3 which would manifest any intention on the part of either the assignor or the assignee to benefit any third person who is not a party to the contract. This is an essential element, which Appellant must establish, since it seeks directly as a third party to enforce the terms of an agreement to which it was not a party.

In the case of *Montgomery vs. Rief, 15 Ut. 495, 50 Pac. 623 (1897)* the Utah Supreme Court stated:

> "To entitle a third party, who may be benefitted by the performance of a contract, to sue, there must have been an intention on the part of the contracting parties to secure some direct benefit to him, or there must be some privity and some obligation or duty from the promisor to the third party which will enable him to enforce the contract, or some equitable claim to the benefit resulting from the promise or the performance of the contract, and there must be some legal right on the part of the third party to adopt and claim the benefit of the promise or contract. 'To entitle him to an action,' said Mr. Justice Rapallo in *Garnsey v. Rogers, 47 N. Y. 233,* 'the contract must have been made for his benefit. He must

> be the party intended to be benefited.' 'But it is not every contract for the benefit of a third person that is enforceable by the beneficiary. It must appear that the contract was made and was intended for his benefit. The fact that he is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of the parties to secure to him personally the benefit of its provisions'."

Judged by the foregoing law, it would appear that there is nothing in the assignment which would indicate any intention on the part of the Kings or the Evans to benefit the original vendor under the contract, and particularly there would be no intention to benefit Prudential Federal Savings and Loan Association, which at the time of the assignment was a mortgagee of the original vendor.

In considering "all of the facts and circumstances, including the words and acts of the parties forming the background of the transaction" (as per the *Radley case, supra)* it would appear that Prudential Federal Savings and Loan Association is really only trying to upgrade the mortgage which it originally held. It would be rather far-fetched for Prudential Federal Savings and Loan Association to assert that either the original purchaser or any of their subsequent assignees had assumed the sellers mortgage and agreed to pay the balance due thereon. In reality, Prudential Federal Savings and Loan Association is attempting to do indirectly what it could not do directly.

In considering all of the facts and circumstances, it is clearly established by the acts of the parties that the Evans

never intended to take possession of the real estate which was the subject matter of the contract, for they assigned their interest in the contract to the real estate agents who negotiated the transaction for them immediately upon receiving the assignment.

In its Brief, Appellant has asserted that the Court erroneously disregarded an assignment of claims made by the Kings to Prudential Federal Savings and Loan Association. However, this assignment purports to assign the benefits of the hold-harmless agreement between the Kings and the Evans, which is not assignable, as a matter of law. Furthermore, the assignment was made approximately 7 months after the commencement of the foreclosure action and after the Kings (who never filed an Answer in this matter) were in default.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the trial court did not err in dismissing the claim of Prudential Federal Savings and Loan Association for a deficiency judgment against Respondents, and it is respectfully urged that this Court affirm the decision of the trial court.

Respectfully submitted,

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